

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GARY D. SMITH, on behalf of
himself and all others similarly
situated,
Plaintiff

VS.

GURSTEL CHARGO, PA,
Defendant

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Case No.: 8:14-cv-00183-FG3

MOTION TO MODIFY FINAL JUDGMENT

Through its undersigned counsel Defendant moves the Court to modify the final judgment in this case, and in support of such motion would respectfully show the following:

1. On March 31, 2014, the Court granted final approval of the class settlement in this case.

2. On that same date the Court entered a final judgment.

3. The judgment varies materially with two terms of the settlement, First, Section 2.5(C) of the settlement agreement (Document 22-1) provided, in relevant part:

Each Class Member, upon the Court's entry of a Final Order and Judgment, shall be enjoined by that Order from instituting or maintaining any action for the Released Claims against the Released Persons. The Court's Final Order and Judgment shall enjoin such actions for the Released Claims.

4. This was a material term of the agreement. The mere dismissal of the class claims leaves Defendant forced to argue in any court where it may be sued over the effect of the settlement. The injunction contemplated by the settlement agreement ensures that any such dispute will be heard by this Court.

5. Second, Section 2.1(E) of the agreement states, in pertinent part:

Among other things, the Final Order and Judgment shall include provisions which **dismiss the Litigation with prejudice**, approve the proposed relief to the Class, and grant the individual and class releases described in this Agreement and approve Plaintiff's attorney fees.

6. The final judgment entered in this case granted a money judgment against Defendant. However, no such judgment was contemplated or agreed to by Defendant. The Settlement provided for an equitable judgment approving and directing completion of the settlement. The order to perform its obligations under the settlement agreement ensures that Defendant will pay what is due to Plaintiff and the class or face contempt sanctions.

7. Furthermore, as of the time of filing of this motion Defendant has paid the monetary portion of the award, making modification appropriate under Fed. R. Civ. P. 60(b)(5).

8. Defendant moves the Court to modify the judgment entered on March 31, 2015. Specifically, they request the following modifications:

- a. Strike the paragraph that states:

Judgment is entered in favor of the plaintiff and against the defendant in the amount of \$1,000 in statutory damages and \$2,000 in compensation for service as Class Representative and in the amount of \$12,547.60 for attorney fees.

and

- b. Insert the following provisions:

The parties are directed to carry out the terms of the settlement agreement filed as Document 22-1 in this case. Defendant shall make all distributions as set forth therein.

Plaintiff, the Class Members, and all of their heirs, executors, administrators, successors, assigns, and any person or entity acting for, on behalf of, or for the benefit of any such persons are hereby permanently enjoined from suing upon, pursuing, or demanding any legal or equitable relief for any of the Released Claims, save and except for the compensation set forth above.

With the exception of the foregoing injunction all other claims in this Action are hereby dismissed with prejudice.

This Order, the Settlement Agreement, and the existence and nature of the Settlement are not, and shall not be construed as, an admission by Defendant of any liability or wrongdoing in this or in any other proceeding.

9. Such relief is necessary to give effect to the settlement contemplated by the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that a true and correct copy of the foregoing Motion has been served on Defendants' attorney below through the Court's ECF system, on this 28th day of April, 2015:

/s/ Amy Lynn Van Horne

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